

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0424

RAMON MIRELES)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 04/28/2020
NAM SERVICES)	
)	
Employer)	
)	
MARIA PAGOURTZIS)	
)	
President-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Attorneys' Fees and Costs of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lewis S. Fleishman (Lewis S. Fleishman, PLLC), Houston, Texas, and Lara D. Merrigan (Merrigan Legal), San Rafael, California, for claimant.

Maria Pagourtzis, League City, Texas, self-represented petitioner.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Maria Pagourtzis (petitioner), appearing without representation, appeals the Supplemental Decision and Order on Attorneys' Fees and Costs (2018-LHC-01632) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended. 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse

of discretion or not in accordance with law. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant sought benefits for work-related injuries to his right ankle and leg sustained while working for employer on June 19, 2014. In his Decision and Order dated February 19, 2019, the administrative law judge found claimant entitled to temporary total disability benefits from June 20, 2014 through March 2, 2018, ongoing permanent total disability from March 3, 2018, and medical benefits. He further found employer failed to secure the payment of longshore compensation through an insurance policy or self-insurance as required by Section 32(a) of the Act, 33 U.S.C. §932(a). Because she was president of employer, the administrative law judge held employer and petitioner jointly and severally liable for the awarded benefits under Section 38(a) of the Act, 33 U.S.C. §938(a).¹ The administrative law judge provided claimant's counsel 60 days to file a fee petition, and employer/petitioner 30 days thereafter to file objections. The district director filed and served the administrative law judge's decision on February 22, 2019. No party timely filed an appeal. *See* 33 U.S.C. §921(a); 20 C.F.R. §§702.350, 802.205(a).

Claimant's counsel, Lewis S. Fleishman, filed a fee petition on April 18, 2019. No objections to the fee petition were filed. In his Supplemental Decision and Order on Attorneys' Fees and Costs dated May 22, 2019, the administrative law judge awarded Mr. Fleishman his requested fee in its entirety, finding it reasonable and supported. He ordered employer and petitioner to jointly and severally remit to Mr. Fleishman an attorney's fee

¹Section 38(a) of the Act states:

Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and *such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said chapter in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure to payment of compensation as required by section 932 of this title.*

(emphasis added).

totaling \$28,797.35. The district director filed the administrative law judge's fee award on May 30, 2019.

On June 7, 2019, petitioner wrote to the administrative law judge seeking to "appeal the ruling" and raising contentions arising from the formal hearing on the merits. This correspondence was forwarded to the Board, which, on July 1, 2019, acknowledged the letter as petitioner's appeal. *See* 20 C.F.R. §802.207(a)(2). By Order dated October 4, 2019, the Board clarified that petitioner's appeal is of the administrative law judge's fee award issued May 22, 2019, and filed May 30, 2019. The Board also stated that because of petitioner's unrepresented status, no petition for review and supporting brief was required and review of the appeal would be "under the general standard of review." 20 C.F.R. §§802.211(e), 802.220. Claimant filed a response brief on November 12, 2019, seeking dismissal of the case. Because the formal record had not been forwarded to the Board, on January 8, 2020, the Board dismissed the appeal without prejudice and remanded the case to the district director to either reconstruct the record or return the case to the administrative law judge for a new hearing.

On January 31, 2020, claimant filed a timely motion for reconsideration of the Board's January 8, 2020 Order, asserting the appeal should have been dismissed with prejudice because petitioner did not timely appeal the decision on the merits and her timely "notice of appeal" does not purport to appeal the fee award. Claimant also asserted the Board should not have given the district director the option of remanding the case for a new hearing since the decision on the merits had become final.² By Order dated February 26, 2020, the Board granted claimant's motion for reconsideration in part and struck "that portion of the January 8, 2020 Order alternatively directing remand to the Office of the Administrative Law Judges for a new hearing." The Board also directed claimant's counsel to forward all of the attorney's fees materials to the Board and stated that "[u]pon receipt of the materials from the proceeding below, the case will be reinstated on the Board's docket." The Board received the complete record on February 27, 2020, and reinstated the appeal on its docket on March 12, 2020.

Petitioner did not file a notice of appeal of the administrative law judge's decision on the merits within 30 days of February 22, 2019, the date the district director filed the administrative law judge's decision. 33 U.S.C. §921(a). Thus, we are without jurisdiction to address any issues concerning that decision, including claimant's entitlement to benefits and petitioner's liability for those benefits. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. ___, 138 S.Ct. 13, 16 (2017) (appeal filing deadline prescribed by statute

²Claimant appended a copy of the district director's August 26, 2019, Order declaring employer and petitioner to be in default of the awarded compensation.

is “jurisdictional;” late filing of the appeal notice necessitates dismissal of the appeal.); *Leon v. Todd Shipyards Co.*, 21 BRBS 190 (1988).

However, we reject claimant’s argument that the Board lacks jurisdiction to review the administrative law judge’s fee award due to an inadequate notice of appeal. A notice of appeal must contain, *inter alia*, information identifying the decision or order being appealed such as the OALJ file number, OWCP number, and the date of the order or decision being appealed. 20 C.F.R. §802.208(a)(4), (5). Notwithstanding these requirements, “any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of §802.205 [notice of appeal].” 20 C.F.R. §802.208(b); *see Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff’d*, 303 F. App’x 928 (2d Cir. 2008). Petitioner’s June 1, 2019 letter to the administrative law judge was accompanied by the district director’s service sheet dated May 30, 2019, filing and serving the administrative law judge’s fee award, and was timely as a notice of appeal with respect to that decision. The documents together are sufficient to establish a timely appeal of the administrative law judge’s fee award. 20 C.F.R. §802.208(b). Therefore, we deny claimant’s motion to dismiss the appeal.

As petitioner is without counsel, we will review the administrative law judge’s fee award under the “arbitrary, capricious, abuse of discretion, and in accordance with law” standard.³ *See Conoco, Inc.*, 194 F.3d at 691, 33 BRBS at 192(CRT); 20 C.F.R. §802.211(e), 802.220. The administrative law judge informed all parties on procedures relating to the filing of claimant’s counsel’s fee petition. *See* Decision & Order (Feb. 19, 2019), at 17; 20 C.F.R. §702.132(a). He stated employer/petitioner did not file any objections to claimant’s counsel’s April 18, 2019, fee petition. *Supp. Decision & Order* (May 22, 2019), at 1. Because employer/petitioner did not raise any objections to the fee petition before the administrative law judge, any objections to the reasonableness of the

³We reject claimant’s contention that the Board’s decision to waive the briefing requirement for unrepresented petitioner and to apply its general standard of review constitutes an abuse of discretion. The Board’s regulations do not differentiate between a claimant without counsel and an employer without counsel; rather, the Board’s regulations speak only in terms of “a party” not represented by an attorney. 20 C.F.R. §§802.211(e), 802.220. Second, claimant’s contention that he was disadvantaged by having to respond to a “non-existent” petition for review and supporting brief is belied by his submission of a comprehensive brief in this case. Claimant was made aware the appeal would involve review of the administrative law judge’s one-page fee order in the Board’s October 4, 2019 Order such that, contrary to his contention, he knew what order he must defend well in advance of the submission of his November 12, 2019 response brief.

fee are waived on appeal. See *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guaranty Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53 (2010); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); *Burch v. Superior Oil Co.*, 15 BRBS 423 (1983). In the absence of any objections to the fee petition, the Board's review is limited to legal errors.

As noted above, we lack jurisdiction to review the administrative law judge's finding that petitioner, through application of Section 38(a), is jointly and severally liable with employer for the awarded attorney's fee. Section 38(a) states a corporate officer's liability extends to "any compensation *or other benefit* which may accrue" under the Act. See n. 1, *supra*. This would include any attorney's fees awarded under 33 U.S.C. §928. See *Shirrod v. Pacific Rim Envtl. Resources*, 628 F. App'x 963 (9th Cir. 2015). The liability of employer and petitioner stems from Section 28(a) in this case because, as the administrative law judge found, employer did not pay any compensation in this case after claimant filed his claim. See, e.g., Decision & Order (Feb. 22, 2019) at 15. Section 28(a) of the Act provides that an employer is liable for a reasonable attorney's fee if it declines to pay any compensation after receipt of notice of the claim, and there is a "successful prosecution" of that claim. 33 U.S.C. §928(a); see *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116 (CRT) (5th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109 (CRT) (5th Cir. 2001); 20 C.F.R. §702.132. Claimant successfully prosecuted his claim by obtaining an award of disability and medical benefits. Consequently, the administrative law judge's award of an attorney's fee to claimant's counsel totaling \$28,797.35 under Section 28(a), is payable jointly and severally by employer and petitioner.

Accordingly, we deny claimant's motion to dismiss petitioner's appeal. We affirm the administrative law judge's Supplemental Decision and Order on Attorneys' Fees and Costs.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge